No. 12,238

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER R. JOHNSON,
Appellee.

APPELLANT'S REPLY BRIEF.

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FURTHER STATEMENT OF THE CASE.

In appellee's statement of the case, he states (p. 2) that it would appear that Moore should have turned in his report some time early on December 22, 1946.

In this we agree. The evidence does not definitely disclose that the report was to be turned in immediately, but the deduction therefrom may be obvious.

Moore was at the Navy Air Base. He was going to the Navy Ammunition Depot to turn in his report (R. 13, 74). He asked appellee if he wanted to ride with him. They went to the Navy Ammunition Depot (R. 72) to do so. This was in line of duty, but Moore did not do so. The Court may take judicial notice that the military forces are not only trained but required to turn in reports promptly, unless anything

to the contrary appears. The military forces are trained for war, and prompt reporting is fundamental in their orders and training. If Moore was not to turn in his report, why did he go there? But the evidence shows he went there to turn in his report. Suppose Moore drove the vehicle on his own business for six months and then turned in his report. Would it still be in the line of duty of turning in his report?

Appellee states (p. 3) that the place where Moore was to deliver his report "was on the route Moore would have to take in order to return directly to the Fifth Service Dispensary at the Ammunition Depot."

Let us see: (1) Moore and appellant were at the Navy Air Base; (2) They went to the Ammunition Depot to deliver the report but did not; (3) They went back to the Air Base so Johnson could cut the hair of about six sailors; (4) They then went to Agana to eat; (5) Moore agreed to drive the sailors and appellee back to their quarters at the Ammunition Depot and the Navy Air Base (R. 63); (6) En route they stopped at the "Brig" on a personal matter, and then proceeded to the Ammunition Depot. En route the accident happened.

If Moore, in the first instance, was on his way to the Ammunition Depot to deliver his report (which it is conceded he was), then the trips as outlined above with the exception of the first, were not on a direct route. If Moore was on government business at Agana, where he took appellee to eat, and was

only on business of the Government—then it may be argued it was on the direct route.

But Moore was where he had no official business to be. The cases cited show that going to meals is not within the scope of employment (pp. 15-16 Appellant's Opening Brief).

Furthermore, if Moore had a duty to deliver a report, he should not have been there. His duty did not require his "wanderings" and to deliver customers to a barber shop or to return appellee to his living quarters. Moore's report could have been delivered in half an hour, yet it appears it was postponed for over seven hours to accommodate his "wanderings."

THE LAW AS TO PROOF.

The United States can be sued only by its consent. This consent must be strictly construed.

United States v. Sherwood, 312 U. S. 584, 590;
Schillinger v. United States, 155 U. S. 163, 166.

The Federal Tort Claims Act does not consent to be sued in all cases where a private person would be liable in tort. The act specifically states it may be sued only when "* * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment." Jurisdiction of the Court must be established by the plaintiff before recovery can be had. He is required to establish certain primary facts which are set forth in the act.

No presumption of law, or, of course, inferences can establish this.

Hubsch v. United States, 174 Fed. (2d) 7;
Murphy v. United States, 79 F. Supp. 925;
Fries v. United States, 170 Fed. (2d) 726;
Christian as Administrator v. United States (D. C. W. D. Kentucky Sept. 15, 1949);
United States v. Campbell, 172 Fed. (2d) 500;
Other cases cited in opening brief.

In addition, the burden of proof, under the California law, and perhaps the law of Guam, is on the appellee.

> "The plaintiff in order to recover ***must*** be able to *prove* that the defendant *did some act,* without which the collision would not have occurred * * *." (Italics ours.)

2 Cal. Jur. 10 Yr. Sup. p. 460 (citing authorities);
Mazgedian v. Swift & Co., 22 C. A. (2d) 570 71 Pac. (2d) 833.

THE LAW AS TO THE NEGLIGENCE OF GOVERNMENT DRIVER.

Proof would have to be established that the driver knew, or should have known, of the existence of the defects in the vehicle.

2 Cal. Jur. Supp. 234.
Azzaro v. O'Connell, 121 Cal. App. 617-622, 9 Pac. (2d) 345.

There is no evidence that Moore knew or should have known by the exercise of ordinary care, of the

defects. In fact, it appears otherwise. In view of the above *res ipsa loquitur* could not apply. No cases are cited by appellee to sustain his contention that it does apply. The doctrine of *res ipsa loquitur* is only an inference. The appellee must prove that appellant did some act, or omitted to do something which, if done, would have prevented its occurrence, and that he must demonstrate that appellant was enabled to foresee or know of the danger of his conduct, in order to recover. This appellee has not done. We also do not think that the doctrine of *res ipsa loquitur* applies when the facts raise an issue as to whether the negligence was attributed to the driver or some other person or cause. There being no evidence of the negligence of the driver, the facts raise an issue of negligence, if any, of some other person.

Besides, the apparently unsurmountable obstacle of appellee proving negligence under the law of Guam, the burden of proof being upon him, it appears that under the Federal Tort Claims Act itself, that the appellee can not recover.

It would further appear that the negligence of the appellant has not been established.

Dated, San Francisco, California,
December 5, 1949.

Respectfully submitted,

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